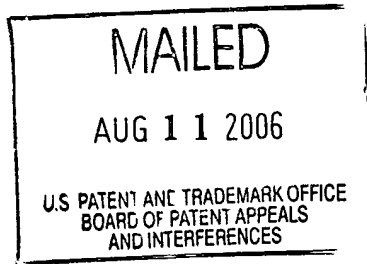


The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE



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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte DAVID C. MAY

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Appeal No. 2006-1309  
Application No. 09/166,625

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ON BRIEF

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Before KIMLIN, WARREN, and WALTZ, Administrative Patent Judges.  
KIMLIN, Administrative Patent Judge.

REQUEST FOR REHEARING

Appellant requests rehearing of our Decision of April 28, 2006 wherein we affirmed the examiner's rejections of all the appealed claims under 35 U.S.C. § 103.

We have thoroughly reviewed the points made in appellant's Request, but we remain of the opinion that the claimed subject matter would have been obvious to one of ordinary skill in the

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art within the meaning of § 103 for the reasons articulated by the examiner and set forth in our decision.

Appellant takes issue with our statement at page 5 of the Decision that "appellant has not attached any criticality to the claimed thickness, and the disclosed *preference* for the claimed thickness would seem to allay any suggestion of criticality . . . ." Appellant notes the specification disclosure at page 10 that the non-woven layer preferably has a thickness in the range of 1-2 mils to gain the advantage of absorbing and laterally dispersing fluid. However, a stated preference is not tantamount to establishing criticality. As noted in our Decision, appellant based no argument upon unexpected results attached to the claimed thickness for the first layer.

Concerning the error in Garland's disclosure of the thickness of the non-woven layer, we stated in our Decision that "appellant has not refuted the examiner's calculations by pointing to any error therein but has simply offered a bald challenge to the calculations" (page 5 of Decision). Appellant belatedly now comes with a response discussing disclosures in Blackburn, Duncan, and Marquart. However, inasmuch as this line of argument was not present in appellant's principal or reply briefs, it is untimely and not properly before us. In any

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event, the claimed thickness for the first layer would have been obvious to one of ordinary skill in the art in the absence of evidence of unexpected results. Again, no such evidence is of record.

Appellant also maintains that the claimed thickness is not a change in a condition of a prior art composition because the prior art does not disclose a first layer of the claimed thickness having a non-woven fabric material including natural or rayon fibers. However, for the reasons set forth in our Decision, we find that the claimed first layer would have been obvious to one of ordinary skill in the art. We note that appellant has not addressed our discussion concerning the breadth of the appealed claims with respect to their encompassing a first layer comprising both natural and synthetic fibers in the non-woven fabric.


In conclusion, we have granted appellant's request to the extent we have reconsidered our decision, but the request is denied with respect to making any change therein.

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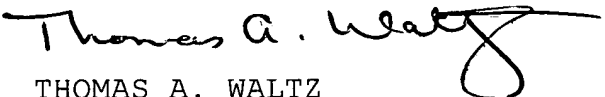
No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

DENIED

  
EDWARD C. KIMLIN )  
Administrative Patent Judge )

  
CHARLES F. WARREN )  
Administrative Patent Judge )

BOARD OF PATENT  
APPEALS AND  
INTERFERENCES

  
THOMAS A. WALTZ )  
Administrative Patent Judge )

ECK:clm

Appeal No. 2006-1309  
Application No. 09/166,625

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